APPENDIX J: FEDERAL, STATE, LOCAL, TRIBAL AND INTERNATIONAL AUTHORITIES APPLICABLE TO THE SANCTUARY AREA

Federal, State, Local, Tribal and International Authorities Applicable to the Sanctuary Area

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I. INTRODUCTION

Presented below is an overview of various State, Federal, Tribal and international management authorities which have statutory responsibility for protecting marine resources in the Olympic Coast National Marine Sanctuary study area. This discussion includes a description of relevant legislative mandates and, in some cases, the administrative measures taken to accomplish them (Some additional information is provided in the FEIS/MP).

II. STATE JURISDICTION

A. State Statutes

1. The **Aquatic Lands Act** (ALA, RCW 79.90) provides the policies under which the Department of Natural Resources manages all state-owned aquatic lands, emphasizing a balance of benefits to all state citizens, water-dependent uses, and environmental concerns. ALA establishes the multiple use concept, which provides for several uses, either simultaneously or in planned rotation, on a single tract of aquatic land. The Act governs sales and leases of state aquatic lands, aquaculture, property rights and easements, administration of tidelands and harbor areas, rents and fees, dredge disposal, and archaeological research.

2. The **Clean Air Washington Act** (CAWA, RCW 70.94) declares that air pollution is the state's most serious environmental problem. The Act establishes a statewide program (1) to prevent the deterioration of air quality in areas with clean air and (2) to return the air quality in other areas to levels that protect human health and the environment. In some respects, CAWA is more stringent than the federal Clean Air Act. A State Air Pollution Control Board and Local Air Pollution Control Authorities are established and, together with the Department of Ecology, are empowered to regulate activities such as outdoor burning (of any kind), industrial emissions, commercial/residential burning, and motor vehicle emissions. This is a broad-ranging act that extends state jurisdiction over such coastal activities as offshore oil production emissions, slash burning in coastal areas, controlled burns of marine oil spills, at-sea incineration, concentrated vessel emissions, coastal industrial emissions, etc. The act also assures protection of scenic, aesthetic, and cultural aspects of the natural environment, including marine vistas, that are threatened by air pollution.

3. The **Energy Facility Siting Act** (EFSA, RCW 80.50) creates and authorizes the Energy Facility Site Evaluation Council, a quasi-judicial regulatory body. The council serves as a one-stop agency for permitting major energy facilities within the state. This act would also pertain to energy facilities in the coastal zone and potential discharges from those facilities into the air and marine environments. Legislative policy states a desire to protect the ecology of state waters and their aquatic life through responsible site planning.

4. The **Environmental Coordination Procedures Act** (ECPA, RCW 90.62) establishes a procedural option to reduce the burden and confusion associated with multiple environmental permit requirements for certain private or corporate project proposals. It directs the Department of Ecology to develop and administer a "master application" process and, upon applicant request, coordinate all permit requirements for any project affecting the state's air, land or water resources. This, in effect, provides permit applicants the opportunity for one-stop-shopping. The Act also requires DOE and all county governments to establish environmental permit information centers (EPICs) to provide information to the public regarding federal, state, and local permits which govern the use of natural resources and to assist applicants in the preparation of master applications. Note: No applicant has filed a master application since the early 1980s because the changing nature of most project proposals complicates and nullifies efforts to coordinate permit procedures.

5. The **Fisheries Code** (RCW 75) provides management guidelines for food fish and shellfish and authorizes the Department of Fisheries (WDF) to protect and manage recreational and commercial salt-water fisheries. The Act also authorizes the Department of Fisheries, jointly with the Department of Wildlife (WDW), to administer the **Hydraulic Code** (RCW 75.20), requiring that construction projects in state waters obtain a permit from either WDF or WDW to ensure protection of fish, shellfish, and wildlife resources of the state.

6. The **Growth Management Act** (GMA, RCW 36.70A) mandates coordinated and comprehensive land-use planning by municipalities and counties to provide for future growth and protect air and water quality. One planning goal of the act is to maintain and enhance natural resource-based industries, including fisheries. Each coastal community must include in its comprehensive land use plan provisions for the preservation and conservation of coastal resources and water quality.

7. The **Hazardous Waste Management Act** (HWMA, RCW 70.105) establishes "a comprehensive state-wide framework for the planning, regulation, control, and management of hazardous waste [to] prevent land, air, and water pollution and conserve the

natural, economic, and energy resources of the state." HWMA grants broad powers of regulation to the Department of Ecology in matters related to hazardous waste regulation, management and disposal. The Act also gives DOE "preemptive authority" for the siting of hazardous waste treatment, storage, disposal, and incineration facilities. This law affects the 3-mile offshore jurisdiction of the state and regulates any activities that introduce hazardous materials into that area.

8. The **Marine Recreation Land Act** (MRLA, RCW 43.99) allocates funds from the state marine fuel tax assessment for the acquisition and improvement of marine recreational land and for the preservation and conservation of open space in the coastal zone.

9. The **Noise Control Act** (NCA, RCW 70.107) authorizes the Department of Ecology to establish maximum permissible noise levels for identified environments "in order to protect against adverse effects of noise on the health, safety and welfare of the people, the value of property, and the quality of environment." DOE can implement performance standards, evaluation criteria, and rules
to carry out this chapter. The department can also establish use standards, regulating the time and place of occurrence for an operation that produces noise above specified levels.

10. The **Ocean Resources Management Act** (ORMA, RCW 43.143) recognizes conflicting use demands in Washington marine waters and directs that "priority shall be given to resource uses and activities that will not adversely impact renewable resources over uses which are likely to have an adverse impact on renewable resources." ORMA establishes planning and project review criteria to evaluate uses and activities that adversely impact renewable resources and associated industries in coastal waters. The Act further states that "there is not enough information available to adequately assess the potential adverse effects of oil and gas exploration and production off Washington's coast." In accordance with this finding, it directs the Department of Ecology (DOE) to produce an oil and gas leasing analysis and places a moratorium on the leasing of state marine lands for oil or gas activities until July 1, 1995. At that time the Legislature will decide whether to continue or terminate the moratorium based on the analysis provided by DOE. Other provisions of the Act are codified in the Revised Code of Washington (RCW) as follows:

Transport of Petroleum Products - Financial Responsibility (RCW 88.40) prescribes financial responsibility requirements for vessels that transport petroleum products across the waters of the state." Oil cargo vessels exceeding 300 gross tons must provide evidence to the Department of Ecology of financial liability and responsibility for a potential spill in the marine waters of the state.

11. The **Oil and Gas Conservation Act** (OGCA, RCW 78.52) provides for extensive regulation of oil and gas drilling, production, storage, transportation and refining operations within Washington State. The Act requires preparation of an environmental impact statement (EIS) for any proposed drilling operation through or under any surface waters of the state. The Department of Ecology is directed to review EIS documentation and submit recommendations for approval or denial of drilling permits to the Oil and Gas Conservation Committee.

12. The **Oil and Hazardous Substance Spill Prevention and Response Act** (RCW 90.56) superceded and consolidated previous legislation concerning oil spill prevention and response. It also expanded state authority over spill prevention and response and granted additional powers to the Department of Ecology to enforce the provisions of this act. The provisions of the Act are codified in the Revised Code of Washington (RCW) as follows:

Oil and Hazardous Substance Spill Prevention and Response (RCW 90.56) This chapter includes the major themes and core provisions of the original Act. It is based on the Legislature's determination that prevention is the best method to protect the marine environment from oil and hazardous substance spills. In order to establish a comprehensive prevention and response program to protect the state's waters and natural resources from spills of oil, the chapter (a) provides broad powers to the Department of Ecology relating to spill prevention and response; (b) supports and compliments the federal Oil Pollution Act; (c) requires the development, adoption, and execution of a state-wide master spill prevention and contingency plan; (d) requires spill prevention and contingency plans from oil storage and transfer facility operators; (e) provides for state spill response and wildlife rescue planning and implementation; (f) ensures that responsible parties are liable and have the resources and ability to respond to spills and provide compensation for all costs and damages; (g) establishes the Oil Marine Oversight Board as an independent authority to assess adequacy of prevention and contingency planning; and (h) establishes a state oil spill response account.

Office of Marine Safety (RCW 43.21I) This chapter creates the Office of Marine Safety as a state agency to "provide leadership and coordination in identifying and resolving [a] threats to the safety of marine transportation and [b] the impact of marine transportation on the environment." The Office is to serve as a center for expertise in marine transportation issues.

Vessel Oil Spill Prevention and Response (RCW 88.46) This chapter assigns specific duties and powers to the Office of Marine Safety (OMS). It directs OMS (a) to establish a state tank vessel inspection program; (b) to establish and enforce standards for tank vessel spill prevention plans; (c) to establish and enforce rules and standards for the preparation of contingency plans concerning the containment and cleanup of oil spills from covered vessels (tank, cargo, and passenger vessels);

(d) to establish and supervise Regional Marine Safety Committees for the purpose of planning for the safe navigation and operation of all vessel traffic in state waters; (e) to develop an emergency response system for the Strait of Juan de Fuca and the Pacific Coast; and (f) to define requirements for containment and recovery equipment aboard tanker vessels and at refueling, bunkering, and lightering stations. The chapter abolishes the Office of Marine Safety effective July 1, 1997 and transfers all its powers, duties and functions to the Department of Ecology.

13. The **Oil Spill Response System - Maritime Commission Act** (RCW 88.44) creates the Washington State Maritime Commission to prepare comprehensive oil spill response plans for all state waters. The Act also requires the development of a data base from existing information sources of accidents, groundings, near misses, and oil discharges of all cargo and passenger vessels entering state waters and report such information to the Office of Marine Safety. The Commission is granted broad powers to make rules, and enter into contracts to assure a complete response in the first 24 hours following a spill event. The Commission is also given authority to assess vessels transiting the waters of the state, to collect such assessments, investigate violations, and enforce the provisions of the act.

14. The **Planning Enabling Act** (PEA, RCW 36.70) enables counties to form planning commissions and counties, cities and others to form regional planning commissions. Comprehensive planning and zoning requirements are established. Among the elements of the comprehensive plan are land use, circulation, conservation, recreation, transportation, and public services and facilities.

15. The **Public Lands Act** (PLA, RCW 79) authorizes the Commissioner of Public Lands to lease or not lease state-owned lands (including those within 3 miles of shore); the Act sets terms and conditions of leases, provides for conservation areas and natural area preserves, and defines property rights and governmental authority over tidelands and shorelands of the state. Within the Public Lands Title of the Revised Code of Washington (RCW 79) are sections governing oil and gas leases on state lands, natural area preserves, natural resources conservation areas, marine plastic debris, and aquatic lands.

16. The **Puget Sound Water Quality Management Act** (PSWQMA, RCW 90.70) restructured the Puget Sound Water Quality Authority (PSWQA - originally established in 1983) and directed it to develop and oversee a comprehensive plan for the restoration and protection of the biological health and diversity of Puget Sound waters. The Puget Sound Water Quality Management Plan primarily addresses issues that impact water quality. The scope of planning includes all the waters of Puget Sound north to

the Canadian border, the Strait of Juan de Fuca, and, to the extent that they affect water quality in Puget Sound, all waters flowing into the Sound, and adjacent lands. Lead state agencies and local governments are responsible for implementing individual plan components. These existing governmental authorities are required to evaluate and incorporate applicable provisions of the plan into their policies and activities. The Puget Sound Water Quality Board is responsible for setting goals and policy for the PSWQA. The Board is chaired by the Director of the Department of Ecology.

17. The **Seashore Conservation Area** law (RCW 43.51.650) declares all Washington Pacific Coast beaches (under state ownership or control) to be a conservation area for public recreation. The law restricts non-recreational uses of Pacific beaches and assigns priority consideration to preserving such areas in a natural condition. Recreation management plans are required for ocean beaches within the conservation area. The law is administered by the Washington State Parks and Recreation Commission.

18. The **Shellfish Sanitary Control Act** (RCW 69.30) instructs the State Board of Health to monitor the sanitation of shellfish growing areas, processing facilities and operations and to establish health requirements for the safe harvesting and processing of shellfish. The State Department of Health has authority to enforce the standards established by the Board and issues certificates of approval for all commercial growing, harvesting, and processing operations and facilities. The department has authority to revoke operating permits and close shellfish beds from harvest when it determines that unhealthy conditions exist.

19. The **Shoreline Management Act** (SMA, RCW 90.58) is administered by the Department of Ecology (DOE) and stands as benchmark legislation for the conservation of marine resources in Washington State. The Act provides a framework and a uniform set of rules to guide planning and management of human activities and development in the coastal zone. SMA emphasizes governmental protection in the management of state-owned aquatic lands, with a preference for long-term over short-term benefits. It applies from the shoreline seaward 3 miles and inland for 200 feet. Detailed zoning, implementation, and enforcement is a local governmental responsibility. Shoreline municipalities and counties develop local master plans that must be reviewed and approved by DOE. These plans are then incorporated into state law as components of the state Coastal Zone Management Plan. The Department of Ecology maintains supervisory authority and monitors permits issued by local governments. In 1983, the SMA was amended to provide DOE with authority for issuing permits for oil or natural gas exploration activities conducted from state marine waters. The SMA is an approved program under the federal

Coastal Zone Management Act and is therefore protected by federal consistency requirements (i.e., no federal activity can violate any provision of an approved shoreline master plan).

20. The **State Environmental Policy Act** (SEPA, RCW 43.21) requires that an environmental impact statement (EIS) be conducted for any proposed legislation or activity that has a probable, significant adverse impact upon the natural environment. The Act is intended to ensure that government makes informed environmental decisions before issuing approval for any project. It requires government agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making which may have an impact on [the] environment". The Act is binding on all state agencies and is usually administered and enforced through local governmental permit authorities such as city and county planning departments.

21. The **Water Pollution Control Act** (WPCA, RCW 90.48) designates the Department of Ecology as lead state agency for implementation of federal Clean Water Act provisions. DOE is given extensive rule-making and enforcement authority to control and prevent the pollution of all surface and underground waters of the state. The Act authorizes the department to (a) regulate various types of discharge (e.g. oil, chlorinated organics, and agricultural runoff); (b) issue waste disposal permits and regulate treatment facilities; (c) delineate and monitor sewage drainage basins; (d) issue water quality protection grants; and (f) regulate forest practices that affect water quality. The department is also authorized to recover damages for the destruction of any natural resource(s) due to violations of the Act. This act, together with the Puget Sound Water Quality Management Act and the federal Clean Water Act, form the basis of a comprehensive Water Quality Program at DOE.

22. The **Wildlife Code** (Also referred to as the *Game Code*, RCW 77) is the assimilation of all state laws that directly regulate fresh-water fisheries and upland wildlife resources in the State of Washington. WDW is given paramount responsibility by the Legislature "to preserve, protect, and perpetuate all wildlife species" in the state - both game and non-game. In addition to its primary authority over fresh-water fisheries, WDW regulates all non-game marine invertebrates (e.g. snails and barnacles) and some anadromous fish species. It is also the lead state agency with oversight responsibility for marine mammals. The Wildlife Code regulates fishing; hunting; trapping; transfer, transportation, and importation of game; sale of wildlife; and wild land and wildlife restoration. Section 16.120 of the code authorizes the State Wildlife Commission to extend special protection to individual fish and wildlife species. This section is the basis of authority for the state **"Endangered" and**

"Threatened" Species Lists. The Code also regulates tidelands used as public shooting grounds, protects bald eagles, and extends WDW enforcement jurisdiction throughout all marine areas of the state.

B. Landmark Judicial Decisions

1. **United States v. State of Washington, 1974** (The Boldt Decision, 384 F. Supp. 312, 1974) was a landmark case in the State of Washington concerning the State's ability to condition or limit tribal fishing rights. This is an expansive and complex case. Several important supplemental judgements have been issued since the 1974 decision and, as of February 1993, forty subproceedings of this case were still outstanding. The original suit was filed by the United States, on its own behalf and as trustee for several Washington native tribes, against the State of Washington and others, seeking declaratory and injunctive relief concerning off-reservation treaty fishing rights. Judge Boldt (Senior District Judge of the US District Court, Western District of Washington) ruled that (1) Washington State has the legal authority to regulate the exercise of native tribes' off-reservation treaty right fishing only to the extent necessary for conservation of fishery resources, (2) any one of the plaintiff tribes was entitled to exercise its governmental powers by regulating the treaty right fishing of its members without any state regulation thereof, provided the tribe had and maintained certain specified qualifications and accepted and abided by certain delineated conditions, and (3) certain Washington statutes and regulations, delineated in the opinion, failed to meet the standards governing their applicability to the native exercise of treaty fishing rights and therefore could not lawfully be applied to restrict members of tribes having such rights from exercising same. A significant result of this case is the guarantee that treaty right fishermen may take up to 50% of the harvestable number of fish at usual and accustomed grounds and stations. (West's Federal Supplement)

C. Cooperative Agreements

1. The **Crabber-Towboat Agreement**, formally termed the "Towboat/Fishing Lane Negotiations," applies to most of the west coast of the United States. Due to mutual interference between West Coast crab fishermen and towboats with tows, a non-binding agreement was reached in 1971 to provide towing lanes for towboats along a major portion of the West Coast. Almost every year since, a meeting has been held to review these towboat lanes; some significant changes have been made.

The general agreement is that crab fishermen will not put crab pots in the designated lanes. If they choose to do so, they forfeit the right to complain if tugs and tows destroy their pots. The towboaters agree to stay within the designated lanes, or well outside the fishing areas, as long as weather and ship

safety allow. The facilitator of negotiations publishes and distributes a series of charts delineating the towboat lanes in the affected areas and issues revisions when negotiated changes are made. Regulatory authorities recognize the existence of this voluntary agreement and have elected not to regulate the activity as long as the two industries - fishing and towing - can resolve conflicts through mutual agreement.

Prior to 1990, negotiations were led by the Oregon State University Sea Grant Extension Program. In January 1990, the Northwest Towboat Association agreed to organize annual lane negotiation meetings and assume responsibility for chart production and distribution. The costs of the mutual agreement are shared by the towboat and crab fishing industries.

2. The **Timber, Fish, and Wildlife Agreement** (TFW) of 1987 was a non-binding mediated resource management plan between forest land owners, native tribes, natural resource management agencies, and environmental groups. Following passage of the Forest Practices Act of 1974 (RCW 76.09) by the Washington State Legislature, conflict over timber harvests escalated dramatically. TFW evolved to break the deadlock of litigation and conflict surrounding forest practices on non-federal land in Washington State. It has no formal or legal status, and thus depends on the good faith of the TFW cooperators and the adopted rules. The agreement establishes "interdisciplinary (ID) teams" to assess proposed timber harvest sites on a case-by-case basis to determine the harvest method and conditions that best minimize environmental, ecological, and cultural damage. Teams consist of resource managers, harvesters, biologists, and tribal representatives to develop integrated, balanced plans for each site. The Department of Natural Resources retains final authority for approving all harvest plans but coordinates with the ID teams to work out problems. TFW is designed to resolve such conflicts as clear cutting and over-siltation of rivers and estuaries. The agreement identifies and protects spawning areas, wildlife corridors and other sensitive habitat through land set-asides known as Riparian Management Zones and Upland Management Areas. It also contains a research component to investigate impacts of forest practices on the environment. TFW indirectly affects the marine zone through its impact on anadromous fisheries and through reduction of siltation in estuaries. The TFW Agreement has a stated lifetime of eight years, at which time the parties will assess the effectiveness of the program and decide whether or not to continue the agreement.

D. State Agencies and Local Authorities

1. **Cities and Counties** have primary responsibility for administering shorelines master programs and adopting other land use regulations. Counties and cities protect marine resources through shoreline development permitting; development of comprehensive growth management plans; and ordinances

regulating zoning, sensitive areas protection, grading and clearing, and drainage. In addition, local governments may use SEPA to protect wetlands and other sensitive areas.

2. **Department of Agriculture** coordinates aquaculture interests in the state.

3. **Department of Ecology** is the state's primary environmental agency to manage, protect, and enhance the state's air, land, and water resources. The responsibilities and opportunities for protecting habitat are legislatively mandated as well as delegated by the federal government. DOE administers permit programs under the Clean Water Act and the Clean Air Act. The Department has extensive authority in all matters concerning pollution and hazardous waste in the state and monitors the health and welfare of the state's natural resources. DOE also administers the Shoreline Management Program at the state level, conducts environmental research and investigations, and provides expert advice to the Governor and Legislature on environmental matters.

4. **Department of Fisheries** protects and manages the state's food fish and shellfish resources. Under that general authority, the Department manages major recreational and commercial marine fisheries and protects fishery habitat. WDF reviews all proposed construction plans in coastal waters for impacts to fisheries and fishery habitats and may approve, condition or deny such projects through the Hydraulics Permit program. The Department's Habitat Investigation Division is responsible for the pro-active assessment and protection of marine habitats critical to the marine fish resources of Washington. The Shellfish Program is responsible for management and protection of classified shellfish resources on public lands. WDF has a marine law enforcement division to assure compliance with the provisions of the state fisheries code.

5. **Department of Health** has authority over shellfish beds, processing, and distribution. The Department monitors shellfish beds for signs of contamination that pose a health risk to the public and has the authority to order closures when unsanitary conditions exist.

6. **Department of Natural Resources** manages most of the state's marine and upland property holdings. The properties are managed as a public trust. Marine lands are managed for maximum public benefit, while uplands are managed to provide revenue to the state's schools. The state owns approximately 11 square miles of harbor area, 140 square miles of shorelands, and 206 square miles of tidelands. The state also owns the beds of all navigable waters (marine lands below mean lower-low water to three miles offshore, and navigable lakes and rivers). DNR administers aquatic lands under a variety of programs. DNR is

authorized to issue leases, rights of way, and easements. It also may sell resources from aquatic lands.

7. **Department of Transportation**, Marine Division manages the state's ferry fleet. The director of the Marine Division also serves as chair of the State Board of Pilotage Commissioners which prescribes requirements for pilotage and licensing of marine pilots in Washington.

8. **Department of Wildlife** is given paramount responsibility by the Legislature "to preserve, protect, and perpetuate all wildlife species" in Washington State - both game and non-game. The Department has primary authority over fresh-water fisheries, but also regulates all non-game marine invertebrates (e.g. snails and barnacles) and some anadromous fish species. It is also the lead state agency with oversight responsibility for marine mammals and administers a bald eagle protection program. WDW reviews the status of all wildlife species in Washington and selects certain species for special protection under state law by including them on state endangered and threatened species lists. The Department's Habitat Administration Program maintains information bases on upland habitat, stream habitat, and critical habitat areas. WDW, together with the Department of Fisheries, evaluates proposed water-side construction projects for impacts to fisheries habitats and grants, conditions or denies Hydraulics Permits based on its findings. The Department regulates fishing; hunting; trapping; transfer, transportation, and importation of wildlife; sale of wildlife; and wild land and wildlife restoration.

9. **Energy Facility Site Evaluation Council** includes representatives from 13 state agencies. The Council was created as a one-stop agency for permitting major energy facilities within the state. It is a formal regulatory body which acts as the lead agency for the state EIS process for energy facilities, conducts quasi-judicial reviews of project proposals, and makes formal recommendations for gubernatorial action on these matters.

10. **Office of Marine Safety** was created by the Legislature to "provide leadership and coordination in identifying and resolving threats to the safety of marine transportation and the impact of marine transportation on the environment." OMS is responsible for developing standards and programs for oil tank vessel inspection, maritime oil spill prevention and response, and safe transport of oil through Washington waters. The Office is to provide expert analysis of marine transportation issues to the executive and legislative branches of government.

11. **Parks and Recreation Commission** provides recreation opportunities for Washington citizens, preserves

natural heritage areas and conservation areas, and manages 104 developed park properties. The Commission manages several developed state parks in the coastal area for recreation and preservation and is the managing agency for the seashore conservation area - a recreation zone that protects the Pacific Coast beaches of Washington for public enjoyment. The agency has three divisions - Administrative Services, Operations, and Resources Development - which are responsible for land acquisition, park development, scenic rivers, and environmental protection programs.

12. **Puget Sound Water Quality Authority** was established by the Legislature to develop and oversee a comprehensive plan for the restoration and protection of the biological health and diversity of Puget Sound waters. The Authority also co-manages the Puget Sound Estuary Plan with the US Environmental Protection Agency. PSWQA's primary mandate is to collect data on the status of the inland waters of Washington, monitor water quality in the Sound and adjacent waters, to prepare a comprehensive plan to address water quality degradation from point source and non-point source emissions, to educate the public about threats to watersheds and the marine environment, and to coordinate with existing state, federal, and tribal authorities to implement and enforce the provisions of the comprehensive management plan for the Puget Sound Basin. The Director of the Department of Ecology chairs the Puget Sound Water Quality Board; however, the Authority maintains a great degree of autonomy

III. FEDERAL JURISDICTION

A. Federal Statutes

Like State authorities, Federal programs vary greatly in approach and scope, ranging from fairly broad-based legislation for resource conservation and environmental protection (e.g., The National Environmental Policy Act and Magnuson Fishery Conservation and Management Act) to regulation of specific activities and resources.

1. **The Act to Prevent Pollution from Ships** (APPS, 33 USC § 1901 et seq.) The International Convention for the Prevention of Pollution of the Sea by Oil, 1954, and the Oil Pollution Act of 1961 have been superseded by the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78) and implemented by the Act to Prevent Pollution from Ships, 1980, as amended in 1982, 1987 (APPS). APPS, in implementing Annex I of MARPOL 73/78, regulates the discharge of oil and oily mixtures from seagoing ships, including oil tankers. APPS, in implementing Annex II of MARPOL 73/78, regulates the discharge of noxious liquid substances from seagoing ships. Enforcement of

the Act is the responsibility of the USCG.

When more than 12 nautical miles from the nearest land, any discharge of oil or oily mixtures into the sea from a ship subject to APPS other than an oil tanker or from machinery space bilges of an oil tanker subject to APPS is prohibited except when: 1) the oil or oily mixture does not originate from cargo pump room bilges; 2) the oil or oily mixture is not mixed with oil cargo residues; 3) the ship is not within a Special Area (the study area is not a Special Area for purposes of APPS); 4) the ship is proceeding en route; 5) the oil content of the effluent without dilution is less than 1000 parts per million (ppm); and 6) the ship has in operation oily-water separating equipment, a bilge monitor, bilge alarm or combination thereof (33 CFR 151.10(a).

The restriction on discharges 12 nautical miles or less from the nearest land are more stringent. When within 12 nautical miles of the nearest land, any discharge of oil or oily mixtures into the sea from a ship other than an oil tanker or from machinery space bilges of an oil tanker is prohibited except when: 1) the oil or oily mixture does not originate from cargo pump room bilges; 2) the oil or oily mixture is not mixed with oil cargo residues; 3) the oil content of the effluent without dilution does not exceed 15 ppm; 4) the ship has in operation oily-water separating equipment, a bilge monitor, bilge alarm, or combination thereof; and 5) the oily-water separating equipment is equipped with a 15 ppm bilge alarm. NOTE: In the navigable waters of the U.S., the CWA, section 311(b)(3) and 40 CFR 110 govern all discharges of oil and oily mixtures (33 CFR 151.10(b).

A tank vessel subject to APPS may not discharge an oily mixture into the sea from a cargo tank, slop tank or cargo pump bilge unless the vessel: 1) is more than 50 nautical miles from the nearest land; 20 is proceeding en route; 3) is discharging at an instantaneous rate of oil content not exceeding 60 liters per nautical mile; 4) is an existing vessel and the total quantity of oil discharged into the sea does not exceed 1/15,000 of the total quantity of the cargo that the discharge formed a par (1/30,000 for new vessels); 5) discharges, with certain exceptions, through the above waterline discharge point; 6) has in operation a cargo monitor and control system that is designed for use with the oily mixture being discharged; and 7) is outside the Special Areas (33 CFR 157.37.)

APPS is amended by the Marine Plastic Pollution Research and Control Act of 1987 (MPPRCA), which implements Annex V of MARPOL 73/78 in the U.S. The MPPRCA and implementing regulations at 33 CFR 151.51 to 151.77 apply to U.S. Ships (except warships and ships owned or operated by the U.S.) everywhere, including recreational vessels, and to other ships subject to MARPOL 73/78 while in the navigable waters or the Exclusive Economic Zone of the U.S. They prohibit the discharge of plastic or garbage mixed with plastic into any waters and the discharge of dunnage, lining and packing materials that float within 25 nautical miles of the nearest land. Other unground garbage may be discharged beyond 12

nautical miles from the nearest land. Other garbage ground to less than one inch may be discharged beyond three nautical miles of the nearest land. Fixed and floating platforms and associated vessels are subject to more stringent restrictions. "Garbage" is defined as all kinds of victual, domestic and operational waste, excluding fresh fish and parts thereof, generated during the normal operations of the ship and liable to the disposed of continuously or periodically except dishwater, graywaters and certain substances (33 CFR 151.05).

2. The **Clean Air Act** (CAA, 42 USC § 7401 et seq.) sets general guidelines and minimal air quality standards on a nationwide basis in order to protect and enhance the quality of the Nation's air resources. States are responsible for developing comprehensive plans for all regions within their boundaries. Thus, as noted above, discharges of air pollutants over Washington State waters are subject to the control of the Washington Air Quality Control Board.

Per the CAA Amendments of 1990, section 328(a)(1) of the CAA provides that the Administrator of the EPA, following consultation with the Secretary of the Interior and the Commandant of the United States Coast Guard, "by rule, shall establish requirements to control air pollution from OCS sources located offshore of the States along the Pacific...Coast...to attain and maintain Federal and State ambient air quality standards and to comply with part C of title I...New OCS sources shall comply with such requirements on the date of promulgation."

3. The **Clean Water Act** (CWA, (The Federal Water Pollution Control Act) 33 USC § 1251 et seq.) was passed by Congress to restore and maintain the chemical, physical, and biological integrity of the nation's waters. To varying degrees, navigable waters of the United States, the contiguous zone, and the oceans beyond are subject to requirements of the CWA.

The CWA's chief mechanism for preventing and reducing water pollution is the National Pollutant Discharge Elimination System (NPDES), administered by the Environmental Protection Agency (EPA). Under the NPDES program, a permit is required for the discharge of any pollutant from a point source into the navigable waters of the United States, the waters of the contiguous zone, or ocean waters. Within Washington State waters, EPA has delegated NPDES permitting authority to the Washington Department of Ecology. Indian Tribes, however, attain permits directly from EPA.

Since oil and gas development pursuant to Federal lease sales occur beyond State waters, an NPDES permit from EPA is required for discharges associated with this activity. EPA generally grants NPDES permits for offshore oil and gas developments based on published effluent guidelines (40 CFR Part 435). Other conditions beyond these guidelines may, however, be imposed by the Regional Administrator on a case-by-case basis.

The CWA prohibits the discharge of oil or hazardous

substances in quantities that may be harmful to the public health or welfare or the environment, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines and beaches into or upon the navigable waters of the U.S., adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the U.S., except, in the case of such discharges into or upon the waters of the contiguous zone or which may affect the above-mentioned natural resources, where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from ships.

When harmful discharges do take place, the National Contingency Plan (NCP) for the removal of oil and hazardous substance discharges (40 CFR Part 300), which is designed to minimize the impacts on marine resources takes effect. The USCG, in cooperation with EPA, administers the NCP. The NCP establishes the organizational framework whereby oil and hazardous substance spills are to be cleaned up. To carry out the NCP, regional plans have been established; the USCG has issued such a plan for Federal Region IX which encompasses the study area. Under the plan, Coast Guard personnel are to investigate all reported offshore spills, notify the party responsible (if known) of its obligation to clean up the spill, and supervise the clean-up operation. The Coast Guard retains final authority over the procedures and equipment used in the cleanup. If the party responsible for the spill does not promptly begin cleanup operations, the Coast Guard may hire private organizations.

The CWA also requires that publicly owned sewage treatment works meet effluent limitations based on effluent reductions attainable through the application of secondary treatment by July 1, 1977 (33 USC § 1311(b)(1)). EPA does have authority, however, to waive the July 1, 1977 deadline for secondary treatment for discharges into marine waters under certain circumstances (33 USC §1311(h)). There are no wastewater effluents currently being discharged into the Olympic Coast Sanctuary study area. However, the Makah Bay Tribe is studying alternatives for discharging effluents from a planned sewage treatment facility located at Makah Bay.

Permits from the Army Corps of Engineers, (COE) which are based on EPA guidelines, are required prior to the discharge of dredged or fill materials into navigable waters that lie inside the baseline from which the territorial sea (defined to be three nautical miles of shore) is measured and fill materials into the territorial sea (33 USC § 1344; 40 CFR 230.2).

Finally, the CWA requires vessels to comply with marine sanitation regulations issued by EPA and enforced by the USCG (33 USC § 1322).

4. The **Coastal Zone Management Act** (CZMA, 16 USC § 1451 et seq.) was designed to protect the environmental integrity of coastal areas by providing for state and local planning and management of human alterations to the coastal zone. The Act requires that federal actions be consistent with approved state coastal management programs. The consistency review provision of the law gives states a powerful tool to influence federal activities that impact state waters and coastal areas (e.g. offshore oil development). The Act is administered by the Office of Ocean and Coastal Resource Management (OCRM), National Oceanic and Atmospheric Administration (NOAA). The Act uses financial incentives to encourage states to develop coastal zone management plans, then guarantees that all federal activities that directly affect a state's coastal zone will have to be consistent with the federally approved state coastal programs. In 1976, the State of Washington was the first state to have a Coastal Zone Management Plan approved under this Act.

5. The **Comprehensive Environmental Response, Compensation, and Liability Act** (CERCLA, 42 USC § 9601 et seq.), whose principal purpose is the cleanup of hazardous waste sites, consists of four fundamental elements. First, it creates an information-gathering and evaluation system to help Federal and state governments categorize hazardous waste sites and prioritize responses. Second, CERCLA provides Federal authority to respond to releases of hazardous substances. Response actions are carried out pursuant to the National Contingency Plan (NCP). Third, CERCLA establishes a Hazardous Substance Trust Fund to pay for removal and remedial actions and related costs. Finally, CERCLA makes persons responsible for hazardous substance releases liable for costs of removal or remedial action incurred by the Federal or state government; other necessary costs of response incurred by others; damages for injury, destruction or loss of natural resources; and costs of any health assessment or health effects study carried out pursuant to the Act.

6. The **Endangered Species Act** (ESA, 16 U.S.C. § 1531 et seq.) provides protection for listed species of animals and plants in both State waters and the waters beyond. The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) determine which species need protection and maintain a list of endangered and threatened species. One of the most protective provisions of the Endangered Species Act is the prohibition against takings. The term "take" is defined broadly to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct" (16 USC § 1532 (19)). The FWS regulations define the term "harm" to mean an act which actually kills or injures wildlife, including significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. The regulations define the term "harass" to mean "an intentional

or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering" (50 CFR 17.3).

The ESA also provides for the indirect protection of endangered species and their habitats by establishing a consultation process designed to insure that projects authorized, funded or carried out by Federal agencies are not likely to jeopardize the continued existence of endangered or threatened species, or "result in the destruction or adverse modification of habitat of such species which is determined... to be critical" (16 USC §1536). Critical habitat areas for endangered species are designated by the FWS and NMFS. The 1978 amendments to the Act establish a Cabinet level committee authorized to exempt Federal agencies (through an elaborate review process) from compliance with their responsibilities with regard to the jeopardy standard and critical habitat.

Several species of marine mammals found in the study area are listed as endangered or threatened species. These include: 1) sea otter; 2) gray whale; 3) fin whale; 4) right whale; 5) sei whale; 6) blue whale; 7) humpback whale; and 8) sperm whale.

Species of birds listed as endangered or threatened found in the study area include: 1) California brown pelican; 2) American peregrin falcon; 3) short tailed albatross; 4) Aleutian Canada goose; 5) American bald eagle. In addition the State of Washington lists the snowy plover as an endangered species, as well as the marbled murrelet.

7. The **Federal Aviation Act** (49 USC § 1301 et seq.) gives the Secretary of Transportation broad powers to promote air commerce and to regulate the use of navigable airspace to ensure aircraft safety and efficient use of such airspace. In furtherance of the mandate, the Federal Aviation Administration, within the Department of Transportation publishes aeronautical charts which provide a variety of information to pilots, including the location of sensitive areas which should be avoided.

8. The **Fish and Wildlife Act** of 1956 (16 USC §§ 742a-742j; 70 Stat. 119 as amended) Public Law 84-1024 initially established the Fish and Wildlife Service under the Assistant Secretary for Fish and Wildlife and a Commissioner for Fish and Wildlife. The Service consisted of the Bureau of Sport Fisheries and Wildlife and a Bureau of Commercial Fisheries, each having a Director. In 1970, the Bureau of Commercial Fisheries was transferred to the Department of Commerce. The Act was amended by P.L. 93-271 to abolish the office of Commissioner and establish the U.S. Fish and Wildlife Service under a Director. Under this Act, the Secretary is authorized to take such steps as may be required for the development, advancement, management, conservation, and protection of fish and wildlife resources

including but not limited to research, development of existing facilities, and acquisition by purchase or exchange of land and water or interest therein. The Act also authorizes the Service to accept gifts of real or personal property for its benefit and use in performing its activities and services.

9. The **Fish and Wildlife Coordination Act** (16 U.S.C. § 661 et seq.) authorizes the Secretary of the Interior to, among other things: (1) provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public ... fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of this Act; (2) make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) accept donations of land and contributions of funds in furtherance of the purposes of this Act.

Such areas made available to the Secretary of the Interior pursuant to this Act are administered by the Secretary directly or in pursuant to cooperative agreements in accordance with such rules and regulations for the conservation, maintenance, and management of wildlife, resources thereof, and its habitat thereon, as may be adopted by the Secretary of the Interior and the head of the department or agency exercising primary administration of such areas.

10. The **Magnuson Fishery Conservation and Management Act** (MFCMA, 16 USC § 1801 et seq.) provides for the conservation and management of all fishery resources between 3 and 200 nm (5.6-370 KM) offshore. The National Marine Fisheries Service (NMFS) of the Department of Commerce is charged with establishing guidelines for and approving fishery management plans (FMPs) prepared by regional fishery management councils for selected fisheries. These plans determine the levels of commercial, sport and tribal fishing consistent with achieving and maintaining the optimum yield of each fishery. The waters of the study area are within the jurisdiction of the Pacific Fishery Management Council (PFMC).

In addition to non-benthic fishery resources located outside state waters, benthic continental shelf fishery resources located outside state waters such as crabs and sea urchins are also subject to management under the MFCMA. Within Federal waters the MFCMA is enforced by the U.S. Coast Guard (USCG) and NMFS. The Act empowers the Secretary of Commerce to enter into agreements with any State agency for enforcement purposes in State waters. Such an agreement exists between the WDF and NMFS whereby both parties have been deputized to enforce each other's laws. As a

result, PFMC fishery plan enforcement personnel can now enforce State law within 3 nm (5.6 km) and State officers can enforce Federal laws between 3-200 nm (5.6-370 km).

11. The **Marine Mammal Protection Act** (MMPA, 16 USC § 1361 et seq.) provides protection to marine mammals in both state waters and the waters beyond. It is designed to protect all species of marine mammals. As specified in the MMPA, the Department of Interior, U.S. Fish and Wildlife Service (FWS), is responsible for the management of polar bears, walrus (a pinniped), northern and southern sea otters, three species of manatees, and dugong; and Department of Commerce, National Marine Fisheries Service (NMFS), is responsible for all other marine mammals. The Marine Mammal Commission advises these implementing agencies and sponsors relevant scientific research. The primary management features of the Act include: 1) a moratorium on "taking" of marine mammals; 2) the development of a management approach designed to achieve an "optimum sustainable population" (OSP) for all species or population stocks of marine mammals; and 3) protection of populations determined to be "depleted."

MMPA defines "take" broadly to include "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal" (16 USC § 1362(12)). The term "harass" has been interpreted to encompass acts unintentionally adversely affecting marine mammals, such as operation of motor boats in waters in which these animals are found. The MMPA allows certain exceptions to the moratorium. First, the Secretary may issue permits for public display or scientific research. Second, the Secretary may grant exemptions for takes of small numbers of marine mammals incidental to their lawful activities. Third, the Secretary may make a special waiver of the moratorium on taking for particular species of populations of marine mammals provided that the species or population being considered is at or above its determined optimum sustainable population. No such waiver, however, has been granted concerning any marine mammal found in the area under consideration.

Marine mammal species whose population is determined to be depleted receive additional protection. Under only limited circumstances may permits be issued for the taking of any marine mammal determined to be depleted, including but not limited to scientific research and enhancing the survival or recovery of a species or stock of depleted species. Marine mammals listed on the Federal threatened and endangered list include grey, right, fin, sei, blue, humpback, and sperm whales, and the northern (Stellar) sea lion.

The 1988 amendments to the MMPA added requirements that observers be carried aboard commercial fishing vessels to determine levels of incidental take of marine mammals. Commercial fishing activities are divided into categories on the basis of gear-type and associated levels of potential incidental take of marine mammals. For example, Category 1 vessels such as gillnetters may have to carry an observer if requested by NMFS

and the Secretary of Commerce may place observers on vessels in Categories 2 and 3 with the consent of the vessel owner. This observer program has been in operation since early 1990 and although the authority for its management is with the NMFS the day-to-day operational management may be delegated to state and local authorities.

12. The **Marine Protection, Research, and Sanctuaries Act (Title I)** (MPRSA, 16 USC 1431 § et seq.), also known as the Dumping Act, prohibits 1) any person from transporting, without a permit, from the US any material for the purpose of dumping it into ocean waters (defined to mean those waters of the ocean seas lying seaward of the baseline from which the territorial sea is measured) and 2) in the case of a vessel or aircraft registered in the US or flying the US flag or in the case of a US agency, any person from transporting, without a permit, from any location any material for the purpose of dumping it into ocean waters. Title 1 also prohibits any person from dumping, without a permit, into the territorial sea or the contiguous zone extending 12 nautical miles seaward from the baseline of the territorial sea to the extent that it may affect the territorial sea or the territory of the US, any material transported from a location outside of the US. EPA regulates, through the issuance of permits, the transportation for the purpose of dumping, and the dumping of all materials except dredged material; COE regulates the transportation, for the purpose of dumping, of dredged material. The COE permits are subject to EPA review and approval. Title I also makes it unlawful for any person to dump into ocean waters, or to transport for the purposes of dumping into ocean waters, sewage sludge or industrial waste.

13. The **Migratory Bird Treaty Act** (MBTA, 16 USC § 703 et seq.) The essential provision of the Migratory Bird Treaty Act, which implements conventions with Great Britain, Mexico, the USSR, and Japan, makes it unlawful, except as permitted by regulations, "to pursue, hunt, take, capture, kill...any migratory bird, any part, nest or egg" or any product of any such bird protected by the Convention (16 USC § 703). The Secretary of the Interior is charged with determining when, and to what extent, if at all, and by what means to permit these activities. Each treaty establishes a "closed season" during which no hunting is permitted. A distinction is made between game and nongame birds. The closed season for migratory birds other than game birds is year-round. The game birds found in the study area are ducks, geese, mergansers, and brants. As specifically permitted by the Act, the Washington Department of Wildlife has supplemented this authority with its own regulations (see Fish and Game Code Discussion above).

14. The **National Aquaculture Act** (16 USC § 2801 et seq.), as amended, encourages the development of aquaculture in the US by 1) declaring a national aquaculture policy, 2)

establishing and implementing a national aquaculture development plan, 3) directing the Department of Agriculture to act as the lead federal agency for promoting and assisting aquaculture development in the public and private sectors of the economy, and 4) establishing a National Aquaculture Information Center within the Department of Agriculture. The Act primarily instructs USDA to collect information through various means on the status and needs of the aquaculture industry in the US and prepare recommendations to the Congress on actions necessary for the growth and expansion of this industry.

15. The **National Environmental Policy Act** (NEPA, 42 USC § 4321 et seq.) was enacted "to ensure that environmental considerations are considered and weighed appropriately in government planning, policy making, and action." NEPA directs federal agencies to use an interdisciplinary approach in making decisions that may have an impact on the environment.

In proposing a major federal action that significantly affects environmental quality, a federal agency must consult with other federal agencies that have jurisdiction over any environmental aspect of the proposed action. The agency must prepare a detailed Environmental Impact Statement (EIS) describing the anticipated effects of the proposed action, any adverse environmental effects that cannot be avoided, and alternatives to the proposed action. The EIS must discuss the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity. It must also describe any irreversible and irretrievable resource commitments that the proposed action would entail.

One of the Act's most important features is that it provides substantial opportunities for the public to review and comment on actions by federal agencies that have significant environmental impacts. Federal agencies are required to circulate NEPA documents for review and comment to federal, state, and local environmental agencies as well as to the President, the Council on Environmental Quality, and the public. In addition, federal agencies are required to hold public hearings in the affected area to receive public testimony, and formally respond to all comments received on EISs.

16. The **National Historic Preservation Act** (NHPA, 16 USC § 470 et seq.) authorizes the Secretary of the Interior to maintain a National Register of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture." Sites have been listed on the National Register which include or are composed entirely of ocean waters and submerged lands within state waters or on the Outer Continental Shelf.

Any federal agency conducting, licensing, or assisting an undertaking which may affect a property listed or eligible for listing on the National Register must prior to the action take into account the effect of the undertaking on the property and

provide the Advisory Council on Historic Preservation a reasonable opportunity to comment on the proposed action (16 USC § 470f). The Basic criteria applied by the Council is whether the undertaking will change the quality of the site's historic, architectural, archeological, or cultural character (36 CFR Part 800).

17. The **National Park Service Organic Act** of 1916 (16 USC §§ 1, 2-4) established the National Park Service within the Department of Interior to "promote and regulate the use of the federal areas known as national parks, monuments, and reservations." The Act states that the purpose of national parks is to "conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." The Olympic National Park was established and placed under the governance of this act by a legislative amendment of 1938.

18. The **National Wildlife Refuge System Administration Act** of 1966 (16 USC §§ 668dd-668ee; 80 Stat. 927, as amended) Public Law 89-669 defines the National Wildlife Refuge System as including wildlife refuges, areas for the protection and conservation of fish and wildlife which are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, and waterfowl production areas. The Secretary is authorized to permit any use of an area provided such use is compatible with the major purposes for which such area was established. The purchase consideration for rights-of-way go into the Migratory Bird Conservation Fund for the acquisition of lands. By regulation, up to 40 percent of an area acquired for a migratory bird sanctuary may be opened to migratory bird hunting unless the Secretary finds that the taking of any species of migratory game birds in more than 40 percent of such area would be beneficial to the species. The Act requires an Act of Congress for the divestiture of lands in the system, except (1) lands acquired with migratory bird funds may be divested upon approval of the Migratory Bird Conservation Commission; and (2) any lands can be removed from the system by land exchange, or if brought into the system by a cooperative agreement then pursuant to the terms of the agreement.

19. The **Oil Pollution Act** of 1990 (OPA, P.L. 101-380, 33 USC § 2701 et seq.) creates a comprehensive prevention, response, liability, and compensation regime for dealing with vessel and facility-based oil pollution. The OPA provides for environmental safeguards in oil transportation greater than those existing before its passage by: setting new standards for vessel construction, crew licensing, and manning; providing for better contingency planning; enhancing Federal response capability; broadening enforcement authority; increasing penalties; and authorizing multi-agency research and development. A one billion

dollar trust fund is available to cover clean-up costs and damages not compensated by the spiller.

Title I creates a liability and compensation regime for vessel and facility-source oil pollution. Any party responsible for the discharge, or the substantial threat of discharge, of oil into navigable waters or adjoining shorelines or the Exclusive Economic Zone is liable for the removal costs and damages, including assessment costs; for injury, destruction, loss or loss of use of natural resources, injury to, or economic losses resulting from destruction or real or personal property; subsistence use of natural resources, net lost government revenues, lost profits or impairment of earning capacity; and net costs of providing increased or additional public services during or after removal activities. NOAA has the responsibility for promulgating damage assessment regulations and following the regulations will create a rebuttable presumption in favor of a given assessment. Sums recovered by a trustee for natural resource damages will be retained in a revolving trust account to reimburse or pay costs incurred by the trustee with respect to those resources.

Title II makes numerous amendments to conform other Federal statutes, particularly section 311 of the Clean Water Act, to the provisions of the Oil Pollution Act.

Title III encourages the establishment of an international inventory of spill removal equipment and personnel.

Title IV is divided into three subtitles: A) Prevention; B) Removal; and C) Penalties and Miscellaneous. Subtitle A gives added responsibility to the Coast Guard regarding merchant marine personnel, including the review of alcohol and drug abuse and review of criminal records prior to issuance and renewal of documentation. It also amends the Ports and Waterways Safety Act to: require the Coast Guard to "require appropriate vessels which operate in an area of a vessel traffic service to utilize or comply with that service," and 2) authorize the construction, improvement, and expansion of vessel traffic services.

Further, Subtitle A establishes double hull requirements for tank vessels. Most tank vessels over 5,000 gross tons will be required to have double hulls by 2010, while vessels under 5,000 gross tons will be required to have a double hull or double containment systems by 2015. All newly constructed tankers must contain a double hull (or double containment systems if under 5,000 gross tons), while existing vessels are phased out over a period of years.

Subtitle B amends subsection 311(c) of the Clean Water Act, requiring the Federal Government to ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance into or on the navigable waters, on the adjoining shorelines, into or on the waters of the Exclusive Economic Zone, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the U.S. It also requires a revision and republication of the National

Contingency Plan within one year which will include, among other things, a Fish and Wildlife response plan developed in consultation with NOAA and U.S. Fish and Wildlife Service. Nothing in Subtitle B preempts the rights of States to require stricter standards for removal action.

Subtitle C alters and increases civil and administrative penalties for illegal discharges and violations of regulations promulgated under the Clean Water Act.

Title VII authorizes an oil pollution research and technology development program, including the establishment of an interagency coordinating committee that is chaired by Department of Transportation and composed of representatives from the Departments of Energy, the Interior, Transportation, Commerce (including NOAA), and Defense, Environmental Protection Agency, Federal Emergency Management Agency, National Aeronautics and Space Administration, as well as such other Federal agencies as the President may designate.

Title IX amends the Oil Spill Liability Trust Fund and increases from $500 million to $1 billion the amount that can be spent on any single oil spill incident, of which no more than $500 million may be spent on natural resource damage, assessments and claims.

20. The **Outer Continental Shelf Lands Act** (OCSLA, 14 USC § 1331 et seq.), as amended in 1978 and 1985, establishes federal jurisdiction over the mineral resources of the Outer Continental Shelf (OCS) beyond 3 nm (5.6 km) of shore and gives the Secretary of Interior primary responsibility for managing OCS mineral exploration and development. The Secretary's responsibility has been delegated to the Minerals Management Service (MMS).

MMS is charged with supervising OCS oil operations, including approval of exploration, development and production plans and applications for pipeline rights of way on the OCS. Lessees are required to include in exploration, development and production plans specific information concerning emissions and their potential impacts on coastal areas. Such authority includes the enforcement of regulations made pursuant to the OCSLA (30 CFR Parts 250 and 256) and the enforcement of stipulations applicable to particular leases.

In unique or special areas, the MMS may impose special lease stipulations designed to protect specific geological and biological phenomena. These stipulations may vary among lease sale tracts and sales.

In addition to DOI, both the Army Corps of Engineers (COE) and the US Coast Guard (USCG) have responsibility over OCS mineral development to the extent that such development affects navigation (43 USC 1333). COE is responsible for ensuring, through a permit system, that OCS structures, including pipelines, platforms, drill ships and semi-submersibles do not obstruct navigation. USCG assures that structures on the OCS are properly marked and that safe working conditions are maintained

onboard.

21. The **Ports and Waterways Safety Act** (PWSA, 33 USC § 1231 et seq.) as amended by the Port and Tanker Safety Act of 1978 (and the Oil Pollution Act of 1990), is designed to promote navigation and vessel safety and the protection of the marine environment. The PWSA applies both in state waters and the waters beyond out to 200 nautical miles.

The PWSA authorizes the U.S. Coast Guard to construct, operate, maintain, improve or expand vessel traffic services and control vessel traffic in ports, harbors, and other waters subject to congested vessel traffic. The Oil Pollution Act of 1990 amends the PWSA to mandate that the USCG "require appropriate vessels which operate in the area of a vessel traffic service to utilize or comply with that service." The USCG, in conjunction with the Canadian Coast Guard operates a Traffic Separation Scheme (TSS) and a Vessel Traffic Service (VTS) in the Strait of Juan de Fuca to service the tankers, barges, fishing vessels and ferries.

In addition to vessel traffic control, the USCG regulates other navigational and shipping activities. It has promulgated numerous regulations relating to vessel design, construction, and operation designed to minimize the likelihood of an accident and reduce vessel source pollution.

The 1978 amendments of the PWSA establish a comprehensive program for regulating the design, construction, operation, equipping, and banning of all tankers using U.S. ports to transfer oil and hazardous materials. These requirements are, for the most part, in agreement with protocols (passed in 1978) to the International Convention for the Prevention of Pollution from Ships, 1973, and the International Convention on Safety of life at Sea, 1974.

The USCG is also vested with the primary responsibility for maintaining boater safety, including the tasks of conducting routine vessel inspections and coordinating rescue operations.

22. The **Rivers and Harbors Act** (33 USC § 401 et seq.) prohibits the unauthorized obstruction of navigable waters of the United States. The construction of any structure or any excavation or fill activity in the navigable waters of the U.S. is prohibited without a permit from the COE. Section 13 (33 USC § 407) prohibits the discharge of refuse into navigable waters of the U.S., but has been largely superseded by the CWA, discussed above.

23. The **Submerged Lands Act** (SLA, 43 USC § 1301 et seq.) distributes between the states and the federal government title to offshore lands and natural resources (including minerals and all living resources). The Act grants to the states title and ownership of the seabed from the coastline to 3 geographical miles (nautical miles) offshore in the Atlantic and Pacific Oceans and to 3 marine leagues (approximately 10 miles) in the

Gulf of Mexico. States thus have "the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable state law..." The federal government retains the constitutional right "to regulate or improve navigation, [and] to provide for flood control or the production of power..." within state waters.

24. The **Wilderness Act** of 1964 (16 USC §§ 1131-1136; 78 Stat. 890) directs the Secretary of the Interior to review, within ten years every roadless area of 5,000 acres or more and every roadless island regardless of size within the National Wildlife Refuge System and to recommend to the President the suitability of each such area for formal preservation under a special act of Congress.

The Wilderness Act stipulates that management of designated areas should be such as to "leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas,..." To this end, the Act generally prohibits any construction of roads or facilities, logging, any use of motorized vehicles, motorized equipment or motorboats. The Act also provided for termination within designated Wilderness areas of any new entry under the Mining Law of 1872 after December 31, 1983, although valid mineral rights existing as of that date are maintained.

The Act's definition states, in Part that "A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." Further, the definition lists as one of an area's attributes that it "has outstanding opportunities for solitude or a primitive and unconfined type of recreation." Wilderness is the most protective form of designation that can be applied to Federal resource lands, given the prohibitions spelled out in the authorizing Act.(Siehl, George. 1991. "Natural Resource Issues in National Defense Programs. Congressional Research Service Report for Congress. The Library of Congress.)

B. Federal Agencies and Authorities

1. **Army Corps of Engineers** (COE) must approve any plans for development within navigable waters of the United States. This authority was granted by the Rivers and Harbors Act of 1899 and was primarily intended to assure efficient and safe commerce through the nation's waters. The review process now involves socio-economic and environmental impact reviews. The Corps thus has authority over such activities as dredging, ocean dumping, offshore oil platform installation, breakwater construction, marina construction, harbor development, marine outfall installation, etc.

2. **Coastal States Organization** (CSO) promotes the

interests of 35 coastal state and territorial governors in United States coastal affairs.

3. **Department of Commerce** (DOC) regulates international maritime trade through the sanctuary area. However, the Department's most direct influence in the marine sector is through the activities of the National Oceanic and Atmospheric Administration (NOAA). NOAA conducts oceanic and atmospheric research and monitoring on behalf of the federal government, charts the nation's coastal waterways, operates the National Weather Service, manages fishery resources within the nation's 200-mile Exclusive Economic Zone (EEZ), provides expertise in marine pollution prevention and clean-up, administers the federal Coastal Zone Management Program, and enforces marine mammal and fishery protection laws. The National Marine Fishery Service (NMFS) is the branch of NOAA responsible for enforcing US fishery regulations and tracking the health and population status of commercial fishery stocks. NMFS also inspects seafood products and processing facilities for compliance with health standards and enforces the Marine Mammal Protection Act.

4. **Department of Defense** (DOD) conducts on-going activities in the sanctuary area - primarily surface and air military exercises. Some testing and underwater research is also conducted in the area. DOD is exempt from certain regulatory requirements due to national security reasons.

5. **Department of the Interior** (DOI) manages for the federal government a significant amount of tidelands and coastal uplands abutting the eastern sanctuary boundary. The National Park Service manages federal coastal lands on the western Olympic Peninsula and the US Fish and Wildlife Service manages all coastal islands and rocks in the area. The Department has complete police power over the lands of the Olympic National Park and the Washington Islands National Wildlife Refuge.

In addition to the above lands, the Department manages all submerged lands and mineral resources from 3 nautical miles offshore to the edge of the continental shelf. The Minerals Management Service has authority to lease federal offshore tracts for oil exploration and development; however, the 1992 reauthorization of the Marine Protection, Research, and Sanctuaries Act permanently banned all oil extraction activities within the final boundaries of the sanctuary.

6. **Department of Transportation** (DOT) regulates occupational safety and health on commercial offshore structures. Through the US Coast Guard, it responds to maritime emergencies, inspects vessels, recommends shipping lanes and "areas to be avoided" to the International Maritime Organization, and officiates as on-scene coordinator for oil spills at sea. The Coast Guard regulates and administers vessel licensing, maintains

aids to navigation, conducts maritime law enforcement, and provides coastal defense to the nation. The Coast Guard has broad authority to enforce many laws within the marine environment, including wildlife protection.

7. **Environmental Protection Agency** (EPA) is responsible for the control and abatement of pollution in the categories of air, water, solid waste, pesticides, radiation, and toxic substances. The Agency uses a variety of research, monitoring, regulatory and enforcement activities to carry out its mission. It has direct regulatory authority nationwide for many aspects of waste treatment and disposal. EPA is the lead federal agency for implementing and enforcing the provisions of the Clean Water Act and the Clean Air Act. The Agency has authority over offshore dredge disposal, marine sewage outfalls, point source effluent discharges, air pollution in nearshore areas, and hazardous spills on land in the coastal zone.

8. **Federal Aviation Administration** (FAA) has authority over commercial and civil aviation matters in the sanctuary area and regulates such factors as minimum flight altitude and landing areas.

9. **Federal Maritime Commission** (FMC) regulates the waterborne foreign and domestic offshore commerce of the United States, assures that United States international trade is open to all nations on fair and equitable terms, and protects against unauthorized, concerted activity in the waterborne commerce of the United States. This is accomplished by maintaining surveillance over steamship conferences and common carriers by water; assuring that only the rates on file with the Commission are charged; reviewing agreements between persons subject to the Shipping Act of 1984 and the Shipping Act of 1916; guaranteeing equal treatment to shippers, carriers, and other persons subject to the shipping statutes; and assuring that adequate levels of financial responsibility are maintained for indemnification of passengers.

10. **National Oceanic and Atmospheric Administration** (NOAA) See Department of Commerce.

11. **National Park Service** (NPS) See Department of Interior.

12. **US Coast Guard** (USCG) See Department of Transportation.

13. **US Fish and Wildlife Service** (USFWS) See Department of Interior.

IV. TRIBAL AUTHORITIES

A. Treaty of Neah Bay and the Treaty of Olympia (1855)

The Stevens Treaties of 1855 include the Treaty of Neah Bay (January 31, 1855. 12 Stat. 939) with the Makah Indians and the Treaty of Olympia (July 1, 1855. 12 Stat. 971) whose signatories include the Quinault, Quileute and Hoh Tribes. These treaties secure for these coastal Indian tribes the right to fish and hunt in their usual and accustomed fishing grounds. The Treaty of Neah Bay included the guaranteed right of the Makah to hunt and collect whales in their usual and accustomed harvesting areas. The Treaties also secure access to Tribal lands for Treaty Tribes.

The usual and accustomed fishing areas were delineated by the Boldt Decision in 1974 which concluded that indian tribes of Puget Sound and coastal Washington have the right to an opportunity to take up to 50 percent of the total number of harvestable salmonids, as well as the right to regulate their own fishers (United States v. Washington, 384 F. Supp. 312, 1974). All of the Olympic Coast National Marine Sanctuary waters are designated as Usual and Accustomed Fishing areas.

Aboriginal and treaty-secured rights can only be abrogated if there is clear evidence that Congress actually considered both the conflict between its intended action and Indian treaty rights and chose to resolve the conflict by abrogating the treaty. Regulations which restrict the exercise of treaty-secured hunting and fishing rights are lawful only if they are "reasonable and necessary" to "prevent demonstrable harm" to a harvested species or stock (United States v. Washington, 384 F. Supp. 312,342, 415 (W.D.Wash. 1974) aff'd, 520 F.2d 676 (9th Cir. 1975) and are the least restrictive alternative for achieving this purpose (United States v. Washington, 384 F. Supp. at 342.

V. INTERNATIONAL AUTHORITIES

A. The U.S.-Canada Pacific Salmon Interception Treaty (Pacific Salmon Treaty)

The Pacific Salmon Treaty was signed on January 28, 1985 to provide a means to manage, conserve and rebuild stocks of the five species of salmon that inhabit coastal waters of Oregon, Washington, Alaska and Canada. The primary purpose of the Treaty is to equitably address the problem of "interceptions" -- that is, the harvest of one country's salmon by foreign fishermen. The Treaty requires the U.S. and Canada to prevent overfishing and to provide for optimum production while ensuring that each country receives compensation equal to the salmon originating in its waters. The Treaty does not affect or modify existing aboriginal rights established by treaty or Federal law.

The Treaty established the Pacific Salmon Commission as its decision-making body. Implementing the Treaty involves international rules, numerous parties and several competing interests. The Commission deals with five species of salmon, three major commercial gear groups, plus sport and Indian fishermen. In addition, the Commission deals with four governments and various Indian tribes with a treaty right to a share of the harvestable fish passing their traditional fishing grounds. The Commission itself does not regulate the salmon fisheries, but provides regulatory advice and recommendations to the two countries. Pursuant to the Treaty, each party is required to conduct joint research on migratory and exploitation patterns and extent of interceptions. Further, the parties must share data on proposed enhancement programs.

B. The 1979 Protocol to the Halibut Convention of 1953

The International Pacific Halibut Commission (IPHC), formerly the International Fisheries Commission (IFC), was established in 1923 by a Convention between Canada and the United States for the preservation of the Pacific halibut fishery of the North Pacific Ocean and the Bering Sea. The Commission's authority was gradually expanded and revised by successive Conventions: namely the 1930, 1937, and 1953 Conventions. The 1953 Convention was amended by the Protocol of 1979. In the spring of 1982, the United States passed the necessary legislation to give effect to the 1979 protocol and to repeal the previous enabling legislation; the amended Northern Pacific Halibut Act of 1937.

The Halibut Convention requires that the Commission allocate halibut between U.S. and Canadian fisheries, but is not explicit on domestic allocation. The Commission assumed limited allocative responsibility, but made allocative decisions only after consulting with representatives of the national governments. In 1987, the U.S. National Oceanic and Atmospheric Administration determined that regional fishery management councils should undertake allocating halibut among various domestic user groups.

The Commissions jurisdiction is divided into statistical areas or units delineated by lines spaced 60 nautical miles apart. The Olympic Coast National Marine Sanctuary lies in subarea 2A. Allocation recommendations for area 2A are made to the Secretary of Commerce by the Pacific Fishery Management Council (PFMC) for treaty Indian fisheries and non-treaty sport and commercial fisheries. Representatives of the tribes, the states of Washington and Oregon, the U.S. government, and the IPHC participate in work groups to develop recommendations to the Council. Council recommendations pass through the IPHC for approval. (Trumble, Robert et. al. 1991. "Evaluation of Pacific Halibut Management for Regulatory Area 2A)." Scientific Report No. 74. International Pacific Halibut Commission, Seattle Washington).

C. Cooperative Vessel Traffic Management System (CVTMS)

The Cooperative Vessel Traffic Management System (CVTMS) is a maritime traffic control program jointly managed and operated by the United States and Canada in the Strait of Juan de Fuca and San Juan Island areas. The system is designed to enhance safe and expeditious vessel traffic movement, to prevent groundings and collisions, and to minimize risk of property damage and pollution to the marine environment. It is operated by the US Coast Guard and the Canadian Coast Guard. Vessel Traffic Management Centers of the CVTMS monitor ship movements using radar and radio equipment and issue directions and warnings to control and supervise traffic.

The CVTMS area is divided into zones, each of which is administered solely by the United States or Canada. The appropriate Vessel Traffic Management Center administers, within its zone, the regulations issued by both nations. Each set of regulations applies only to the waters over which the issuing nation has jurisdiction and each nation will enforce only its own set of regulations. The United States regulations (33 CFR 161.200-.266) apply in the CVTMS area to 1) each vessel of 30 meters or more in length and 2) each vessel that is engaged in towing alongside or astern, or in pushing ahead, one or more vessels or objects, other than fishing gear (where the combined length of the vessel and tow exceeds 44 meters, or the vessel or tow individually exceeds 19 meters). Participation with CVTMS is mandatory for most vessels.

A critical component of the system is the joint designation by US and Canadian authorities of a vessel traffic separation scheme to route inbound and outbound traffic. The vessel traffic lanes are printed on both US and Canadian navigational charts. The Vessel Traffic Management Centers can thus issue instructions to keep traffic within the appropriate lanes and reduce congestion and the risk of collision.

The CVTMS - through its use of regulation, vessel surveillance, traffic control, and separation lanes - has been quite successful in averting collisions and groundings. It also contributes valuable assistance during emergency and search-and-rescue operations.